

Public Prosecutor v Lee Jun Ho & Ors

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COURT OF APPEAL — CRIMINAL APPEAL NO W-05-158 OF 2008
RAUS SHARIF, SULONG MATJERAIE AND AHMAD MAAROP JJCA
2 MARCH 2010

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Criminal Procedure — Prosecution — Witnesses — Failure of prosecution to call eye witnesses to murder to testify — Prosecution's attempt to tender recorded statements under s 32(1)(i) of the Evidence Act 1950 rejected — Whether trial court right in doing so — Whether proactive effort taken by police to secure attendance of eye-witnesses — Attempt to locate them only made five years after incident — Whether evidence existed to show common intention among accused to commit offence

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The respondents, who were jointly charged with murdering a doctor together with two others still at large, were acquitted and discharged by the High Court without their defence being called at the end of the prosecution's case. The charge said they caused the doctor's death at his clinic in furtherance of a common intention to commit the murder. The prosecution appealed the verdict to the Court of Appeal. According to the facts, an employee of a restaurant next door to the clinic, on being awakened by a loud scream in the wee morning hours of 21 April 2003, looked out of his first floor dwelling atop the restaurant to see one of the workers of the clinic running out of the clinic covered in blood and being chased by two men, one armed with a knife. The worker fell and was struck by the knife-wielding assailant. The restaurant employee screamed 'polis' to scare off the assailants and then noticed that there was another man standing in front of the clinic while another emerged from inside the clinic. All the four men got into a car driven by a fifth man and they left the scene. When the restaurant worker went down to the clinic to check, he saw blood on the floor at the entrance. He immediately walked to the nearest police beat base to report the incident. Police later located the car which had traces of human blood on the inside. Further investigations led to the arrest of the respondents. During the trial, the prosecution sought to admit the statements, recorded under s 112 of the Criminal Procedure Code ('CPC'), of two workers of the clinic, both Indian nationals, who were present when the robbery-cum-murder took place. The attempt to tender their statements under s 32(1)(i) of the Evidence Act 1950 ('Act') was on the basis the two witnesses could not be found to testify. The High Court rejected the attempt on the ground the police had failed to take all reasonable and practicable steps to trace the witnesses including failing to use in aid various provisions under the CPC which could have secured their attendance in court. Apart from the above reason, the trial court freed the respondents on the ground there was

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A insufficient evidence to show common intention to commit murder and that three men who were allegedly present during a conversation of a plan to rob the clinic of drugs were not called to testify.

Held, dismissing the appeal:

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(1) The statements of the two key witnesses could not be admitted under s 32(1)(i) of the Act because of the absence of effort to secure their attendance on such a serious charge. The basis upon which the prosecution tried to invoke that section was that the witnesses could not be found. However, actions to trace the witnesses were only taken in 2008 in the midst of the trial and five years after the statements were recorded (see para 10).

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(2) There was insufficient evidence to infer that there existed common intention between the respondents and the two others still at large to commit the criminal act within the meaning of s 34 of the Penal Code (see para 12).

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(3) The evidence taken as a whole was insufficient to give rise to an irresistible conclusion that the respondents committed murder. It was not safe to call upon them to enter their defence because if they had elected to remain silent, no court could enter convictions against them. There were gaps in the prosecution's case which it was not the duty of the defence to fill (see para 12).

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[Bahasa Malaysia summary]

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Responden, yang dituduh membunuh seorang doktor bersama dua orang yang lain yang masih bebas, dilepaskan dan dibebaskan oleh Mahkamah Tinggi tanpa dipanggil untuk pembelaan di akhir kes pendakwaan. Pertuduhan menyatakan bahawa mereka telah menyebabkan kematian doktor tersebut di klinik bagi mencapai niat bersama untuk melakukan pembunuhan. Pihak pendakwaan merayu keputusan tersebut kepada Mahkamah Rayuan. Menurut fakta, seorang pekerja restoran di sebelah klinik, apabila dikejutkan oleh jeritan yang kuat awal pagi 21 April 2003, menjengah keluar tingkat pertama kediamannya di atas restoran untuk melihat salah satu daripada

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pekerja-pekerja klinik berjalan keluar dari klinik dengan berlumuran darah dan dikejar oleh dua orang lelaki, yang bersenjatakan pisau. Pekerja tersebut jatuh dan dipukul oleh penyerang yang bersenjatakan pisau. Pekerja restoran menjerit 'polis' untuk menakut-nakutkan penyerang dan kemudian menyedari bahawa ada orang lain yang berdiri di hadapan klinik sementara yang lain

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muncul dari dalam klinik. Kesemua empat lelaki menaiki kereta yang dipandu oleh seorang lelaki kelima dan mereka meninggalkan tempat kejadian. Apabila pekerja restoran pergi ke klinik untuk memeriksa, dia melihat darah di lantai pintu masuk. Dia terus berjalan ke balai polis yang terdekat untuk melaporkan kejadian tersebut. Polis kemudian menjumpai kereta yang mempunyai kesan

darah manusia di bahagian dalam. Siasatan lanjut membawa kepada penangkapan responden. Ketika perbicaraan, pihak pendakwaan mengakui kenyataan, yang direkodkan di bawah s 112 Kanun Acara Jenayah ('KAJ'), dua pekerja klinik, kedua-duanya warganegara India yang hadir apabila rompakan dan pembunuhan berlaku. Percubaan untuk mengemukakan kenyataan mereka di bawah s 32(1)(i) Akta Keterangan 1950 ('Akta') adalah atas dasar dua orang saksi yang tidak dapat ditemui untuk memberi keterangan. Mahkamah Tinggi menolak percubaan atas alasan pihak polis telah gagal untuk mengambil semua langkah yang munasabah dan untuk mengesan saksi-saksi termasuk mengguna pakai pelbagai peruntukan bantuan di bawah KAJ yang boleh memastikan kehadiran mereka di mahkamah. Selain daripada alasan di atas, mahkamah membebaskan responden atas alasan terdapat bukti yang mencukupi untuk menunjukkan niat bersama untuk melakukan pembunuhan dan tiga lelaki yang dikatakan hadir semasa perbualan bagi perancangan untuk merompak perubatan klinik tidak dipanggil untuk memberi keterangan.

Diputuskan, menolak rayuan:

- (1) Kenyataan dua orang saksi utama tidak boleh diterima di bawah s 32(1)(i) Akta kerana ketiadaan usaha untuk memastikan kehadiran bagi satu pertuduhan yang serius. Asas yang mana pihak pendakwaan cuba untuk membangkitkan seksyen adalah bahawa saksi-saksi tidak ditemui. Walau bagaimanapun, tindakan untuk mengesan saksi-saksi hanya diambil pada tahun 2008 di tengah-tengah perbicaraan dan lima tahun selepas kenyataan tersebut direkodkan (lihat perenggan 10).
- (2) Tiada bukti yang mencukupi untuk membuat kesimpulan bahawa wujud niat yang sama antara responden dan dua yang lain yang masih bebas untuk melakukan perbuatan jenayah mengikut pengertian s 34 Kanun Keseksaan (lihat perenggan 12).
- (3) Keterangan yang diambil secara keseluruhannya adalah tidak mencukupi untuk membawa kepada kesimpulan bahawa responden yang melakukan pembunuhan. Ia tidak selamat untuk memanggil mereka untuk memasukkan pembelaan kerana jika mereka memilih untuk berdiam diri, mahkamah tidak dapat memasukkan penghakiman terhadap mereka. Terdapat jurang dalam kes pendakwaan yang mana bukan menjadi kewajipan untuk diisi oleh pihak pembelaan (lihat perenggan 12).]

Notes

For cases on witnesses, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3180–3185.

Cases referred to

Dato Mokhtar Hashim v Public Prosecutor [1983] 2 MLJ 232; [1983] CLJ Rep 101, FC (refd)

- A *Mahbub Shah v Emperor* AIR 1945 PC 118 (refd)

Legislation referred to

Criminal Procedure Code ss 47, 49, 112, 118(1), 396

Evidence Act 1950 ss 32(1)(i), 114 (g)

- B Penal Code s 34

Tetralina bt Ahmad Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

First respondent not present.

Second respondent in person.

- C *Naran Sing (Naran Singh and Co) for the third respondent.*

Raus Sharif JCA:

INTRODUCTION

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[1] The first, second and third accused together with two others still at large were jointly charged with murder. The charge against them reads as follows:

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Bahawa kamu bersama-sama dua lagi yang masih bebas, pada 2 April 2003, antara jam 3.30 dan 4.00 pagi di Pusat Perubatan Arinaga, No 86, Lorong Maarof, Bangsar Park, dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, dalam meneruskan niat bersama kamu semua telah melakukan kesalahan bunuh dengan menyebabkan kematian Dr Ariaratnam a/l Thuraiayah dan oleh yang demikian itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksan dibaca bersama seksyen 34 Kanun yang sama.

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[2] At the close of the prosecution's case, the learned trial judge ruled that the prosecution had failed to prove a prima facie case against all the accused persons. They were acquitted and discharged, without their defence being called.

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[3] The prosecution being dissatisfied with the result appeal to this court. We heard the appeal on 8 September 2009 and dismissed it. We now give our reasons.

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BACKGROUND FACTS

[4] The facts of the case as summarised by the learned trial judge in his grounds of judgment read as follows:

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In early morning 21 April 2003, at about 2am, PW9, Ping Thiam Huat, a restaurant worker, went upstairs of the first floor of the premises of HSBC Restaurant, which is his dwelling, to sleep. A short while later, PW9 heard a loud scream coming from the direction of Klinik Arinaga, which is located next door to HSBC Restaurant. The clinic is on the ground floor.

Looking through a window, PW9 saw a man covered in blood running out of the clinic. The man is a worker of Klinik Arinaga. PW9 saw two Chinese males chasing the man. One of the Chinese males was armed with a knife. The man fell down, and the armed Chinese man struck him. PW9 spontaneously shouted 'polis' to scare them off. He then saw a Malay male standing in front of the clinic.

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A motorcar with another Chinese male at the wheels; was seen outside of the clinic. Upon hearing the shout by PW9, another male Chinese came out from the clinic. There were all together five males: four Chinese and one Malay. They all got into the motorcar bearing registration No WJT 936, and left the scene.

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PW9 then went to the clinic and saw blood on the floor at the entrance. Fear took over him and he dare not venture further. He then went straight to the Pondok Polis Bangsar, to report what he saw. He walked to the Pondok Polis Bangsar. Upon arrival at the Pondok Polis, he was told by the police that they have been informed of the robbery at the clinic by a phone call. PW9 was not the one who made the call.

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Soon later, at about 5.30am, the police arrived at the scene. The forensic unit came about 6.30am. Next day, in the early morning of 22 April 2003, the police managed to trace the motorcar WJT 936, said to be seen at the scene at the crime scene, as described by PW9. The motorcar was recovered from the house of Norhaizan by PW10. The motorcar was then taken to the Police Contingent Kuala Lumpur for examination. Upon examination, traces of human blood were found in various places in the car.

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Further investigation led to the arrest of the 3 accused persons, in the following manner: OKT1, Lee Jun Ho surrendered himself to the police on 27 April 2003, OKT2, Choy Chin Chuan was arrested on 4 May 2003, and OKT3, Nor Adzlan surrendered himself to the police on 5 May 2003. The other two males, who were also seen at the crime scene, were still at large.

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DECISION OF THE HIGH COURT

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[5] The learned trial judge acquitted and discharged the three accused based on three main grounds:

- (a) The prosecution had failed to adduce evidence that reasonable steps had been taken by the investigating officer to locate two eye witnesses, namely Vasudevan s/o Perumal Chelladurai ('Vasudevan') and Vellaichamy Sockkalingam ('Vellaichamy') in order to admit their statements recorded under s 112 of the Criminal Procedure Code by virtue of s 32(1)(i) of the Evidence Act 1950.
- (b) Lack of evidence to show common intention to commit the offence of murder within the meaning of s 34 of the Penal Code.
- (c) Failure of the prosecution to call three friends of PW17 ie Aeron, Alex and Game, triggered the adverse inference under s 114(g) of the Evidence

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A Act 1950.

FINDINGS

B [6] The problem faced by the prosecution in this case was the absence of two key witnesses to testify. The two witnesses were Vasudevan and Vellaichamy. Both were Indian Nationals. They were at the material time workers at Klinik Arinaga and were present during the robbery incident on 21 April 2003.

C [7] Vasudevan was injured during the robbery incident and his statement under s 112 of the Criminal Procedure Code was recorded by the police while he was still in the hospital on 9 June 2003. Vellaichamy's statement was recorded by the police on 8 May 2003 and subsequently a further statement was recorded on 10 October 2005.

D [8] In the course of the trial, the prosecution attempted to tender the statements recorded from the two witnesses under s 32(1)(i) of the Evidence Act 1950 on the ground that the witnesses could not be found.

E [9] In rejecting the prosecution's application to tender the witnesses' statement as evidence, the learned trial judge gave the following reasons:

F (a) The police has failed to take all reasonable and practicable steps to trace the witnesses. There was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses; and

G (b) There was no attempt to fully utilise the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses. The police failed to invoke the provisions of ss 47 and 49 of the Criminal Procedure Code, which empowers the court to issue a warrant in lieu of or in addition to summon a witness and to require that person to execute a bond for his appearance in court. They also failed to invoke the provisions of s 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstance of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provisions of s 396 of the Criminal Procedure Code whereby the public prosecutor may apply to court to commit to civil prison until the trial any witness of any sizeable offence who intends to leave Malaysia and that the ends of justice would probably be defeated if that person were not present at the trial to give evidence.

I [12] We are in complete agreement with the reasoning of the learned trial judge. The basis upon which the prosecution tried to invoke s 32(1)(i) of the

Evidence Act was that the two witnesses could not be found. However, as pointed out by the learned trial judge, actions to trace the two witnesses were only taken in 2008, while in the midst of the trial. The actions were taken five years after recording the witnesses' statements. Thus, as rightly pointed out by the learned trial judge, greater efforts was expected to secure the attendance of the witnesses in such a serious charge. In the absent of such effort, we are of the same view with the learned trial judge that the witnesses' statements of the two key witnesses could not be admitted under s 32(1)(i) of the Evidence Act.

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[11] In the absence of the two eye witnesses to testify and the ruling that their statements could not be admitted as evidence, the prosecution's case become very sketchy. In this case, the three accused persons were charged with committing murder jointly with two persons still at large in furtherance of common intention. The prosecution was invoking s 34 of the Penal Code. It is trite law that for the prosecution to succeed in such course of action it is incumbent for the prosecution to prove that the criminal act was done in concert pursuant to the pre arranged plan or arrangement (see *Dato' Mokhtar Hashim v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101, and *Mahbub Shah v Emperor* AIR 1945 PC 118). In this aspect, the learned trial judge found that there were insufficient evidence for him to infer that there was a common intention between the three accused and the two others still at large to commit the criminal act within the meaning of s 34. He reasoned as follows:

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The only witness that was called to prove the element of common intention was PW17, Chin Yew Eng. In his evidence, PW17 told of a conversation to rob the clinic of drugs; this can be seen at p 185 of the notes of evidence. PW17 also stated that OKT1 then took out three parangs, similar to exh P22B that was recovered at the clinic.

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Under cross-examination, PW17 stated that during the alleged conversation of the plan to rob, three other persons named Aeron, Alex and Game were present (see p 191 of the notes of evidence).

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It is noted that the said three persons who were present during the alleged conversation of the plan were not called to give evidence or even make available for the defence. In view of suggestions made about the alleged conversation during the cross-examination of PW17, the calling or making available of the said three witnesses is essential in the circumstances. Failure to do, would inevitably trigger the adverse presumption under s 114(g) of the Evidence Act 1950 .

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PW17 also told the court that after the incident at the clinic, OKT1 told him that 'they hurt the doctor and the staff' and narrated further that 'Oliver started slashing the doctor and Wai San slashed the staff: (see p 188 of the notes of evidence). Are these actions by the two still at large, Oliver and Wai San, can be accepted as actions in furtherance of a common intention, to commit murder? It is not clear.

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On the weapon used, although it was said that three parangs were shown, only one parang (exh P22B) was recovered. There were not finger prints on P22B. As narrated by PW17, the three parangs were shown at the hotel. One parang was seen, by PW9,

A to be in the hands of the assailant who chased the clinic worker outside the clinic and one parang was recovered inside the clinic. Is the parang (exh P22B) the actual murder weapon? Who handled the parangs at the time of the robbery, at the clinic remained unclear. There is no evidence to show or indicate if any of the three accused were armed with the parangs at the time they went to the clinic.

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[12] We are in agreement with the reasoning of the learned trial judge. We too find that there is insufficient evidence to infer that there existed common intention between the three accused and the two others still at large to commit the criminal act within the meaning of s 34 of the Penal Code. While we found there are some evidence against the three accused to connect them to the incident on 2 April 2003, those evidence taken as a whole are insufficient to give rise to an irresistible conclusion that the three accused committed the offence of murder. Thus, we agree with the learned trial judge that it is not safe to call upon the three accused to enter on their defence. This is because if their defence were called and they elected to remain silence, no court could enter convictions against them. There are gaps in the prosecution's case. And it is not the duty of the defence to fill up the gaps.

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[12] We have scrutinised the record of proceedings with care and we are satisfied that the learned trial judge was right to find that the prosecution had not made out a prima facie case against all the three accused. Accordingly, the learned trial judge was right in acquitting and discharging them without their defence being called. The public prosecutor's appeal was therefore dismissed.

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Appeal dismissed.

Reported by Ashok Kumar

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